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Nos. 87-1303 and 87-1310

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,
v.
COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORP.,
ONEIDA COAL COMPANY, INC., AND
SHAMROCK COAL COMPANY, INC.,
Petitioners,
v.
COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the West Virginia Supreme Court of Appeals properly concluded that the record failed to establish a violation of petitioners' rights under the Equal Protection Clause by the County's reliance on recent sales prices to assess the value of property for *ad valorem* tax purposes.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

Property taxes are an important source of revenue and a vital policy instrument for state and local governments. This case presents a challenge to a system of property assessment that has been commonly used by state and local government taxing authorities throughout the country. The County Assessor for Webster County, West Virginia, annually reviews real estate assessments, and, when a parcel of real estate is sold, adopts the purchase price as the reasonable value of the property.

Petitioners contend that taxing their property on the basis of acquisition price denies them equal protection of the laws so long as other property in the vicinity, which has not been sold, is taxed on the basis of valuations unadjusted for recent sales price information. They argue that the price they paid—plainly the most accurate current measure of the value of their property—cannot be used as the basis of an assessment for tax purposes unless the assessment of all other property in the vicinity is contemporaneously adjusted.

Petitioners do not allege that they have been treated differently from other purchasers of property in the County, or that their property is assessed at a higher percentage of its valuation than other property. They assert only that the reassessment of their property based upon the price at which they purchased it is somehow discriminatory. The only "discrimination" that has occurred is that petitioners voluntarily purchased property at a price above its previously assessed valuation, and that their assessments were raised accordingly. The County's differentiation among properties on the basis of the most recent sale price is justified by considerations of

fairness, administrative convenience and expense and thus satisfies the rational basis test of the Equal Protection Clause; there is no suggestion that petitioners fall within a suspect classification that would trigger more exacting scrutiny.

If the Court were to adopt petitioners' theory, it would impose an intolerable burden on state and local tax assessors. Every time that property is sold for a price above its previously assessed value, the assessor would be forced to determine whether any other properties within the jurisdiction are comparable to the property that has been sold and, if so, to what extent the assessment of such comparable properties should be adjusted to reflect the recent sale. As a practical matter, no taxing authority could meet those burdens where, as here, the properties at issue are not readily comparable condominium units or neighborhood homes but rather vast tracts of land that differ both in terms of size and in terms of the nature and extent of proven and unproven subsurface mineral reserves. In addition, petitioners' theory of assessment would expose the taxing authority to endless contests concerning the reassessment of unsold properties to reflect the equivalent of an unrealized (and perhaps unrealizable) capital gain.

The assessor's alternative, according to petitioners, is to reduce the assessment based on their purchase price to the level of other unsold properties. Such a reduction would not only result in extensive revenue loss, but would also deny the taxing jurisdiction the right to assess property on the basis of the most probative and least costly evidence.

Amici submit that petitioners have failed to demonstrate that the practices of the Webster County Tax Assessor are constitutionally discriminatory. Because this Court's decision will have a direct and profound effect on matters of prime importance to *amici* and their mem-

bers, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

The State of West Virginia imposes a tax upon the ownership of property. The amount of the tax is based upon the "true and actual value" of the property, and the responsibility for appraisal is delegated to county assessors who appraise the value of properties within their jurisdictions and apply rates fixed by the state constitution to arrive at the assessed valuation. The tax is then calculated as a percentage of the assessed value of the property.

The County Assessor for Webster County, West Virginia, has chosen to rely in part upon market forces to determine the appraisal value of properties in that County. During the relevant time period, the county assessor based the assessment value of transferred real property on the acquisition price. The county assessor testified that property that had not been recently transferred was reassessed in 1976, 1982, and 1984 with uniform increases of ten percent on each occasion; petitioners argued below that the assessor did not apply the ten percent increase uniformly to all relevant properties. Pet. App. 6a, 27a-28a; EKE Pet. App. 58a.[2]

Petitioners own over fifteen thousand acres of valuable coal property in Webster County. Allegheny Pittsburgh purchased 7300 acres of Webster County coal property in 1974 for $24.6 million; it sold that coal property to East Kentucky Energy in 1982 for $29.8 million. Shamrock Coal purchased almost 7800 acres of Webster

[1] The parties' letters of consent pursuant to Rule 36 of the Rules of the Court have been filed with the Clerk.

[2] References in this brief to the appendices of the separate petitions for certiorari follow the abbreviation convention used in the Joint Brief for Petitioners ("Joint Brief").

County coal land in 1977 as part of a larger transaction involving coal property, coal leases, and options in three West Virginia counties. The Webster County Assessor appraised the Webster County portion of the property at $5.9 million. In 1981, Shamrock Coal conveyed the Webster County property to a sister corporation, Oneida Coal, without cash consideration.

Within two years of three of these four transfers, the county assessor reassessed petitioners' parcels to reflect the acquisition prices.[3] Petitioners protested these reassessments to the Webster County Commission beginning in 1976.[4] The county commission denied relief, and petitioners appealed the adverse decisions for the years 1976 through 1985. The appeals were consolidated and decided by the Circuit Court for Webster County in February 1986. The circuit court held that the challenged assessments violated petitioners' equal protection rights under the West Virginia Constitution and the Fourteenth Amendment.[5] That court ordered the county commission to reduce the assessments on petitioners' property to a value recommended in a state-wide appraisal guide published in 1975 by the West Virginia State Tax Commission.

The county commission appealed to the West Virginia Supreme Court of Appeals, which reversed the circuit court's judgment in a *per curiam* opinion. The state su-

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[3] The three transfers that triggered reassessment include the 1974 purchase by Allegheny Pittsburgh, the 1982 purchase by East Kentucky, and the 1977 purchase by Shamrock Coal. The 1981 acquisition by Oneida Coal did not trigger reassessment because the transfer was without cash consideration.

[4] With respect to the 7300 acres of land, Allegheny Pittsburgh's challenge relates to the years 1976 to 1983; East Kentucky's challenge relates to the years 1984 through 1986. With respect to the 7800 acres of land, the protests of Shamrock Coal and Oneida Coal relate to the years 1981 to 1986.

[5] The circuit court subsequently issued orders applying its decision to tax year 1986 as well. EKE Pet. App. 83a, 86a.

preme court held that the county assessor's use of acquisition price to determine the "true and actual value" of petitioners' properties complied with the requirements of the West Virginia Constitution, and rejected petitioners' equal protection challenge to the county assessor's practices on the ground that petitioners failed to demonstrate that comparable properties were intentionally and systematically undervalued.

SUMMARY OF ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment does not mandate a rule of exact equality. State and local governments have especially broad discretion to make classifications and distinctions in their tax structures and methods of valuation, as long as the distinctions are rationally related to legitimate state interests, are not drawn along inherently suspect lines, and do not trammel individual rights. Petitioners' equal protection challenge is directed against an assessment procedure that resembles those of other States, and that serves the interests of fairness and administrative convenience.

The Constitution of the State of West Virginia requires that property be assessed on the basis of its true and actual value. The County Assessor for Webster County, West Virginia, appraised petitioners' properties on the basis of the price they paid for each property. Petitioners purchased properties in Webster County, and the assessments of those properties were raised to reflect the acquisition prices. During the period 1976 to 1984, the county assessor also implemented at least three increases in the assessments of properties not recently transferred.

Petitioners failed to demonstrate that these actions of the county assessor undervalued *comparable* properties. Instead, petitioners sought to shift to the county assessor the burden of proving that *neighboring* properties with lower assessments were in fact not comparable to peti-

tioners' properties. The Equal Protection Clause does not require contemporaneous adjustments to the assessments of all potentially comparable properties in a system that values property based on "true and actual value." In the absence of a showing of intentional and systematic discrimination in the valuation of petitioners' properties, the court below properly declined to direct a reduction of their assessments.

ARGUMENT

I. STATE AND LOCAL GOVERNMENTS HAVE BROAD POWER TO ALLOCATE TAX BURDENS TO FURTHER DOMESTIC CONCERNS

The constitutional principles governing the taxation powers of state and local governments are well-established.

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1959). State and local tax systems do not violate the Fourteenth Amendment, or any other provision of the Federal Constitution, merely because they produce disparate tax burdens. "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937). The Equal Protection Clause prohibits "palpably arbitrary" or "invidious" differences in tax treatment; it does not preclude state and local governments from "draw[ing] lines that treat one class of individuals or entities differently from the others." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973).

Throughout this century, the Court has consistently upheld the constitutionality of rational taxation schemes reasonably related to a legitimate state purpose. The Court has confronted, and found constitutionally acceptable, a broad variety of property tax classification schemes that have drawn distinctions based on the identity of the taxpayer, the type of property, the use made of the property, and the government's domestic concerns with the administration and attendant expense of tax valuation and collection.[6] This Court has also expressly held that the broad leeway accorded state governments extends beyond classification of property for taxation and includes the power to "set up different modes of assessment [and] valuation." *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 368 (1940).

In all these cases, the Court refused to "assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy

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[6] *See, e.g., Lehnhausen*, 410 U.S. at 365 (Illinois taxation scheme that taxed corporate personal property but exempted individual personal property held constitutional; the Court accepted Illinois' argument that the individual personal property tax was "discriminatory, unfair, almost impossible to administer, and economically unsound"); *Allied Stores*, 358 U.S. at 530 (classification scheme that taxed residents but exempted nonresidents for merchandise held in storage is constitutional); *Independent Warehouses v. Scheele*, 331 U.S. 70 (1947) (taxation scheme distinguishing between private warehouses and commercial warehouses is constitutional); *Carmichael*, 301 U.S. at 511 ("[a]dministrative convenience and expense in the collection or measurement of the tax" may in some cases be "a sufficient justification for the difference in tax treatment); *Fox v. Standard Oil Co.*, 294 U.S. 87 (1935) (taxation system distinguishing between gasoline stations owned by chains and independently owned gas stations is constitutional); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (tax system distinguishing between merchandise stored by a retail store owner for use in his own store and merchandise stored by a wholesaler for sale to a retailer is constitutional); *Southern Ry. Co. v. Watts*, 260 U.S. 519 (1923) (differential tax treatment of railway property is constitutional).

of the State." *Allied Stores*, 358 U.S. at 528. To the contrary, the Court has held that

> "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

Regan v. Taxation With Representation of Washington, 461 U.S. 540, 547-48 (1983) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)); *see Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974).

The presumption of constitutionality "has weathered nearly a century of Supreme Court adjudication" (*Kahn v. Shevin*, 416 U.S. at 355-56) and is reflected throughout the Nation in a broad diversity of state and local tax systems. State and local governments have implemented a multitude of exemptions and variances to property tax structures in furtherance of a host of varying governmental objectives, including economic development, use of alternate energy sources, and pollution control. By way of example, the appendix to this brief summarizes the number of States using various tax classification systems to foster domestic concerns.

Not surprisingly, differential treatment of taxpayers has generally withstood constitutional challenge with respect to issues of valuation as well as classification. In Alabama, for example, property taxes are generally assessed on the basis of "fair and reasonable market value." *Weissinger v. White*, 733 F.2d 802, 804 (11th Cir. 1984). But Alabama also gives owners of agricultural and forest land the option to elect assessment based

on "current use value" (using a capitalized net income approach) rather than on "fair market value." *Id.* at 804-05. The Eleventh Circuit rejected an equal protection challenge to this difference in valuation technique in recognition of "Alabama's legitimate goal to preserve land for agriculture and forestry . . . ." *Id.* at 807. The court recognized and found constitutionally acceptable the argument that "[a] formula for the evaluation of farm and timber property that routinely holds assessment values below the normal selling price will certainly encourage the continued use of land for its present purpose." *Id.* at 806 (footnote omitted).

California offers another good example of the constitutional flexibility that state and local governments have exercised in the area of valuation of property for tax purposes. In June 1978, California voters added Article XIII A to the state constitution by adoption of an initiative measure commonly known as Proposition 13. The new article imposed important limitations upon the assessment and taxing powers of state and local governments. Pursuant to Section 2(a), real property is assessed not at current value, but rather at its value on the date of acquisition.[7] Various governmental entities and concerned citizens challenged the validity of the new measure on several grounds, including an equal protection claim grounded on the fact that "two substantially identical homes, located 'side by side' and receiving identical governmental services, could be assessed and taxed at different levels depending upon their date of acquisition." *Amador Valley Joint Union High School District v. State Board of Equalization*, 22 Cal.3d 208, 233, 149 Cal. Rptr. 239, 250 (1978).

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[7] Specifically, the new constitutional provision "rolled back" assessments to the value specified by the county assessor in the 1975-1976 tax bill, "or thereafter the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred." The new article also authorized a two percent maximum annual inflationary increase.

The California Supreme Court properly rejected that equal protection challenge, relying in large part on this Court's pronouncements in cases such as *Allied Stores* and *Kahn v. Shevin*. The state court recognized that this Court had accepted "the general rule . . . that a tax classification or disparity of tax treatment will be sustained so long as it is founded upon some reasonable distinction or rational basis." 22 Cal.3d at 235, 149 Cal. Rptr. at 251. The California Supreme Court found a reasonable basis for Proposition 13 in the theory that property taxes should bear some rational relationship to the original cost of the property rather than to "an unforeseen, perhaps unduly inflated, current value." *Id.* This theory enables property owners to estimate "with some assurance [their] future tax liability." *Id.* The state court also found that the system was "fair and equitable" in that the tax "may be said reasonably to reflect the price [the taxpayer] was originally willing and able to pay for his property, rather than an inflated value fixed, after acquisition, in part on the basis of sales to third parties over which sales [the taxpayer] can exercise no control." *Id.*

The valuation used by the Webster County Assessor accommodates the same notion of fairness. In this case, the assessor generally valued property based on its most recent acquisition price, but that official also made other periodic adjustments to the values of property not recently transferred. The valuation distinctions drawn by the Webster County Assessor with respect to the coal property at issue here are supported by reasonable concerns with administrative convenience and expense, interests different from, but no less legitimate than, the interests supporting the valuation distinctions drawn in Alabama and California.

Valuation of coal and other resource real estate is particularly complex and costly, in large part because it requires detailed information regarding the quantity and quality of subsurface minerals. Changes in mineral market conditions and extraction of minerals over time also

affect the continued accuracy of prior valuations. In view of these factors, the reluctance of state and local governments to undertake frequent and costly reappraisals of resource real estate is a reasonable and legitimate domestic concern. This Court has expressly recognized that "[a]dministrative convenience and expense in the collection or measurement of the tax" may be "a sufficient justification" for distinctions among taxpayers. *Carmichael*, 301 U.S. at 511; *see, e.g., Lehnhausen*, 410 U.S. at 365 (accepting Illinois' argument that a personal, as opposed to a corporate, property tax would be "almost impossible to administer, and economically unsound").

Petitioners claim that the practices of the county assessor have "created a dual system of property tax assessment" violative of the Equal Protection Clause. Joint Brief at 20. Petitioners rely in this regard on *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931). The evidence in that case established that coal situated several miles from a river had only half the value of coal situated closer to the river, yet the county commissioners valued all coal lands at an identical rate per acre. This Court found that system violative of the Equal Protection Clause because it ignored "well-known and important differences in value." *Id.* at 30.

Unlike the commissioners in *Cumberland Coal*, the county assessor in this case was not confronted with "well-known" differences in value. To the contrary, the contention advanced by petitioners is that the county assessor failed to take into consideration *unknown* differences regarding the quantity and quality of mineral reserves as to which acquisition of meaningful information would require considerable expenditure of both time and money. *Cumberland Coal* simply does not suggest that the Equal Protection Clause imposes such a heavy burden on state and local governments.

In sum, the Court has traditionally accorded state and local governments wide flexibility in tailoring their tax

structures—and their methods of property valuation—to meet their legitimate concerns, including fairness and administrative convenience. Nothing in this case warrants a departure from that recognition of the States' constitutional "attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests" (*Allied Stores*, 358 U.S. at 526).

Moreover, this case does not offer an appropriate opportunity to revisit this long-standing constitutional principle. As demonstrated below, the West Virginia Supreme Court of Appeals specifically found that petitioners had failed to prove that comparable property of other taxpayers was intentionally and systematically undervalued. That factual finding effectively disposes of petitioners' equal protection claim, without the necessity of further justification of the tax disparity.

II. THE WEST VIRGINIA SUPREME COURT CORRECTLY CONCLUDED THAT PETITIONERS FAILED TO PROVE "INTENTIONAL AND SYSTEMATIC" DISCRIMINATION VIOLATIVE OF THE FOURTEENTH AMENDMENT

Petitioners invoke the well-established rule that "the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property." *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28 (1931). They claim, citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), that the relative overassessment of their property entitles them to have their assessments reduced below "true value," even though state law requires "true value" assessment. The West Virginia Supreme Court of Appeals, which has consistently acknowledged and followed the principles enunciated in *Cumberland Coal* and *Sioux City Bridge* (see *Kline v. McCloud*, 326 S.E.2d 715, 724 (W.Va. 1984); *Killen v. Logan County*

Comm'n, 295 S.E.2d 689, 703-04 (W.Va. 1982)), correctly recognized that they do not apply to the present case.

The West Virginia Constitution provides that "all property, both real and personal, shall be taxed in proportion to its value," and assessed at a uniform percentage of its value. W. Va. Const. art. X, §§ 1, 1b. Under West Virginia Code § 11-3-1, "[a]ll property shall be assessed annually as of the first day of July at its true and actual value . . . ." The West Virginia Supreme Court has held that "the price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value." *Kline v. McCloud*, 326 S.E.2d at 724. Beginning sometime prior to 1975, the County Assessor for Webster County assessed all recently transferred property based upon the value declared in the most recent deed of conveyance to a taxpayer. Pet. App. 27a. Property not recently transferred was generally carried on the tax rolls with the same assessment it had borne in prior years; the assessed values of such property were increased by approximately ten percent in the years 1976, 1982, and 1984. Pet. App. 6a, 27a-28a; EKE Pet. App. 58a.

As a result of these actions of the Webster County Assessor, petitioners' property was assessed based on the value declared in various deeds of conveyance executed in the period 1974 through 1982. Petitioners do not now argue that those assessments were based on values in excess of "true and actual value." Instead, petitioners claim that the failure of the Webster County Assessor contemporaneously to increase the assessment of property not recently transferred amounted to a "systematic and intentional" undervaluation of comparable properties violative of the Equal Protection Clause.

Petitioners assert that the actions of the county assessor produced "enormous disparities" of "historic mag-

nitude" in assessments in Webster County. Joint Brief at 33. In evaluating the validity of petitioners' claim based on the record established below, it is important to recognize that this is not a case involving assessments or reassessments of residential properties in condominium developments or in urban or suburban neighborhoods.[8] In such cases, aggrieved taxpayers presumably can more readily establish the value of truly "comparable" properties, and the taxing authority might find it difficult to assert administrative convenience and expense as a justification for refusing to reassess neighboring units or houses.[9]

This case instead involves the valuation of over 15,000 acres of resource real estate. Some of the acreage is held in fee, and the balance of the ownership is in surface or mineral interests or various combinations thereof. AP Pet. at 3; EKE Pet. at 3; Joint Brief at 5-6. Analysis of the comparability of such property to neighboring parcels and determination of the value of such property interests is necessarily a complicated, expensive, and time-consuming process that requires information regarding numerous factors, especially the quality and quantity of subsurface minerals and projected extraction costs.

Federal and state courts have long recognized the complexity of determining comparability and valuation in the context of resource real estate.[10] The professional

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[8] Petitioners label themselves "stand-ins" for "untold numbers of new homeowners" in Webster County. Joint Brief at 40. But this case presents no issue as to the application of the county assessor's practices in the context of residential assessments in Webster County.

[9] The rate at which residential property is transferred may also vary dramatically compared with commercial and resource real estate, and that factor could also affect the constitutional analysis in the residential context.

[10] *See, e.g., United States v. 1,606.00 Acres of Land*, 698 F.2d 402, 404 (10th Cir. 1983) (noting that expert witness who appraised

literature similarly emphasizes that determinations of comparability require detailed information.[11]

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the value of certain mineral rights had "detailed the complex steps he had taken in making the appraisals"); *United States v. Silver Queen Mining Co.*, 285 F.2d 506, 510 (10th Cir. 1960) ("Some speculation is inherent in the ascertainment of value of all resource property, be it mineral, oil, gas or otherwise"); *Usibelli v. Commissioner of Internal Revenue*, 229 F.2d 539, 541 (9th Cir. 1955) (noting that valuation of mineral deposits "rests upon factors extremely difficult of accurate ascertainment such as the size and quality of the deposit"); *Tug Valley Recovery Center, Inc. v. Mingo County Comm'n*, 261 S.E.2d 165, 173 (W. Va. 1979) ("assessment of real estate values is a very technical and complex area, particularly insofar as we are dealing with the assessment of mineral estates, those estates being invisible to the eye and being difficult to properly and scientifically assess"); *Department of Revenue v. Ford*, 438 So.2d 798, 801-02 (Fla. 1983), *cert. denied and appeal dismissed*, 466 U.S. 946 (1984) (recognizing "the unique difficulty involved in the valuation of subsurface mineral rights" and concluding that the assessment of subsurface rights "impose[s] difficult burdens upon Florida property appraisers"); *Gunsch v. Gunsch*, 71 N.W.2d 623, 631 (N.D. 1955) ("[t]he exact value of real estate is usually difficult to determine. The problem is especially difficult when the value is that of undiscovered minerals. It is a matter of common knowledge that the value of property conveyed by mineral deed in western North Dakota is derived chiefly from oil or coal, or both. The value of such property is more difficult to establish outside of proven areas than is the value of ordinary real estate.").

[11] *See, e.g.*, Merritt, *Coal Exploration, Mine Planning, and Development* 12-13 (Noyes Publications 1986) ("The important resource factors which determine the usefulness of a coal deposit are: 1) coal quality; 2) overburden, thickness and quality; 3) the thickness and continuity of the seam(s), as well as the overall size of the deposit; 4) the geologic structure of the basin; and 5) the strategic location of the deposit with respect to transportation facilities and potential markets . . . . Coal quality, reserve tonnage, environmental conditions, and geological engineering determine the economic minability of a given coal deposit."); Boyd, *Fundamentals of Coal and Mineral Valuations* 101 (C.J. Krehbiel Co. 1986) ("comparable sales case studies should include the same seam(s), have similar geologic and quality characteristics, and be in the same general locality as the property being valued"); Interagency Land Acquisition Conference, *Uniform Appraisal Standards For Federal*

The record reflects that differences in assessments of petitioners' property and *neighboring* property ranged from 800 to 3500 percent. Joint Brief at 33. But those statistics hardly prove unconstitutional discrimination. In fact, the record reflects even wider disparities (as high as 7500 percent) among the assessments of the various parcels in the tract purchased by Allegheny Pittsburgh, and later by East Kentucky.[12] In short, the record contains no showing that petitioners' property and the neighboring property are in fact *comparable*.

With respect to the property held by Oneida Coal and Shamrock Coal, petitioners contend that the disparities in assessment between petitioners' property and "comparable" property ranged from 800 to 2000 percent. Joint Brief at 33. But these percentages are based solely on land book values of neighboring properties. Petitioners offered no expert testimony as to the comparability of such factors as quantity, quality, or difficulty of extraction of the mineral interests on the neighboring tracts. EKE Pet. App. 55a-56a, 60a-62a. In fact, the record demonstrates that there are variations in the extent of mineral interests even *within* certain tracts of petitioners' land.[13] Absent persuasive evidence, the state

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Land Acquisitions 9 (Wash., D.C. 1973) ("Comparison of sales transactions to subject property being appraised" should include information as to "[p]hysical [and] [e]conomic similarities and dissimilarities"); Department of Justice, *A Procedural Guide For The Acquisition Of Real Property By Governmental Agencies* 7 (Wash., D.C. 1965) (emphasizing that acquisition of property with mineral deposits requires review of "detailed valuation estimates").

[12] Allegheny Pittsburgh's assessments in 1976 ranged from $59.89 to $4,516.13 per acre. East Kentucky's assessments in 1984 ranged from $65.87 to $4,967.74 per acre. See Exhibit C, Pet. App. 20a.

[13] For example, East Kentucky's own witness testified that almost all of the 32 million tons of strip mineable coal on East Kentucky's 7,300 acres is located on the western half of the property. Resp. Br. in Opp. 23a.

supreme court was not required to *assume* comparability of neighboring parcels of resource real estate.

With respect to the property held by Allegheny Pittsburgh and East Kentucky (for which the assessment differentials with purportedly "comparable" properties are in the range of 3200 to 3500 percent, Joint Brief at 33), petitioners offered but one expert witness who testified only that nine identified parcels were "geologically . . . comparable" to the East Kentucky tract, by which he meant that they have "the same coal seams present in the area." Resp. Br. in Opp. 6a, 25a. That expert testified that:

—seams vary across property (*id.* at 15a);

—core borings are necessary to confirm an expectation of the presence of a seam (*id.*);

—although he had information from core borings on the East Kentucky tract, he had such information with respect to only two of the nine purportedly comparable tracts, and did not have with him the information on the estimates of mineable reserves on those two purportedly comparable tracts (*id.* at 10a, 14a);

—coal throughout the area varies in thickness, quality, and mineability (*id.* at 15a-16a); and

—although the expert was of the view that there were 32 million tons of strip mineable coal on the East Kentucky tract, he had no estimate as to the number of tons of recoverable coal on some of the purportedly comparable tracts as to which he believed there was mineable coal (*id.* at 16a-19a, 24a).

Petitioners Allegheny Pittsburgh and East Kentucky also rely on a stipulation in which the parties agreed that the neighboring land parcels identified by petitioners were "comparable properties in that they are substantially the same geologically as [petitioners'] prop-

erty." Joint Brief at 8 & n.5.[14] As noted above, "geological" similarity does not in and of itself establish comparability for purposes of valuation. Cases decided by this Court as well as the West Virgina Supreme Court indicate that mere "geological" similarity is hardly sufficient to meet the applicable burden of proof in this type of case. In *Cumberland Coal*, for example, this Court found unconstitutional a taxing scheme that was alleged to have placed the same value on all coal acreage " 'regardless of the remoteness or accessibility of the said coal to market, cost of operation, or means of transportation . . . .' " 284 U.S. at 24. Yet all the lands at issue in *Cumberland Coal* were undoubtedly substantially the same geologically because the same coal seams were present in the area. The West Virginia Supreme Court of Appeals rejected a similar "one factor" comparison in *Bankers Pocahontas Coal Co. v. County Court*, 135 W. Va. 174, 62 S.E.2d 801, 802, 806 (1950), *overruled in part on other grounds, In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346, 109 S.E.2d 649 (1959).

State law requires a taxpayer who challenges an assessment to "show by a preponderance of the evidence that the assessment is incorrect." *Killen v. Logan County Comm'n* (Syllabus Point 8).[15] Moreover, under state law, "[a]n objection to any assessment value may be sustained only upon the presentation of competent evidence, such as that

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[14] This stipulation was apparently not agreed to in the proceeding involving Shamrock Coal and Oneida Coal.

[15] The West Virginia Supreme Court of Appeals prepares the syllabus in each reported decision, and that court has held that the syllabus is the controlling statement of the law. *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S.E. 1000, 1006 (1892). The statements contained in the syllabus, however, must be "read in the light of the opinion." *Jones v. Jones*, 133 W. Va. 306, 58 S.E.2d 857, 859 (1949). *See also Koonce v. Doolittle*, 48 W. Va. 592, 37 S.E. 644 (1900) (the adjudication of facts by the Supreme Court of Appeals is not required to be made in the syllabus).

equivalent to testimony of qualified appraisers." *Killen*, 295 S.E.2d at 706.[16] As the West Virginia Supreme Court held, the record in this case lacks the required evidence.

Petitioners were successful before the trial court not because they established "enormous disparities" in assessments of properties proven by petitioners to be comparable to their own, but rather because they persuaded the trial court that the assessor had not proven that the purportedly comparable properties were sufficiently dissimilar to petitioners' property. The trial court simply misplaced the burden of proof.[17]

Petitioners now ask this Court to rule that a system that reassesses recently transferred property based on acquisition price is constitutionally infirm unless the assessor also incurs the expense and inconvenience of contemporaneously identifying and reassessing all other properties, or all other properties asserted but not proved to be comparable. The Equal Protection Clause has never been held to place such an intolerable burden on state and

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[16] In this context, that burden of proof is wholly consistent with the showing required under federal law. *Regan v. Taxation With Representation of Washington*, 461 U.S. at 547-48; *Lehnhausen*, 410 U.S. at 359-60; *Sunday Lake Iron Co. v. Wakefield Township*, 247 U.S. 350, 353 (1918) ("the burden of proof is upon the complaining party.").

[17] Petitioners assert that the trial court "found" the neighboring parcels of coal property "to be comparable in all respects" to petitioners' property. *E.g.*, Joint Brief at 8. To the extent the trial court made such a finding, it was based on the failure of the County Commission to prove that properties *asserted* by petitioners to be comparable were in fact not comparable. See Pet. App. 29a-30a.

Petitioners also assert that the findings of the trial court were "undisturbed by the Supreme Court of Appeals." Joint Brief at 26. But the state supreme court expressly concluded that the record did not support the trial court's ruling that the actions of the assessor and board of review constituted "intentional and systematic" discrimination. Pet. App. 8a.

local governments. Especially in cases such as this one, where the properties at issue present costly and difficult questions of valuation of subsurface minerals, the taxing authorities should be free to rely on acquisition value without a constitutional mandate for contemporaneous reassessment of other properties.

Thus, it is hardly surprising that the West Virginia Supreme Court concluded that "the record does not support the trial court's ruling that the actions of the assessor and board of review constitute 'intentional and systematic' discrimination." Pet. App. 8a. That conclusion is correct.

III. THE WEST VIRGINIA SUPREME COURT DID NOT RELEGATE PETITIONERS TO AN UNCONSTITUTIONAL REMEDY

Petitioners' claim to a reduction in the tax assessor's valuation of their property depends upon the remedy prescribed by this Court in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), for a taxpayer who has established intentional and systematic undervaluation of the comparable property of others, in violation of the Equal Protection Clause. In the present case, as we have shown, there is no proof that disparities in tax valuation resulted from intentional and systematic undervaluation of properties other than those purchased by petitioners, nor even that the demonstrated disparities existed with respect to properties that were truly comparable. Accordingly, the West Virginia Supreme Court of Appeals properly denied petitioners a reduction in the valuation of their property.

The decision was consistent with other cases recently decided by the West Virginia Supreme Court of Appeals addressing the two different "remedies" that can be implemented in appropriate circumstances to resolve claims of disparate property tax valuation. Each of those remedies is consistent with prior decisions of this Court.

First, the West Virginia Supreme Court has reaffirmed the availability of a *Sioux City Bridge* "reduction in assessment" remedy where the objecting taxpayer has established intentional and systematic undervaluation violative of the Equal Protection Clause or the "equal and uniform" mandate of the state constitution. *Killen v. Logan County Comm'n*, 295 S.E.2d at 703 (adhering to the rule that "where uniformity of taxation and full value assessment could not be reconciled, uniformity took precedence").[18] That remedy is not applicable here, and was not implemented by the state supreme court, precisely because that court found no evidence in the record of intentional and systematic undervaluation.

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[18] Concern with the effect of the "reduction in assessment" remedy prompted the West Virginia Supreme Court to suggest shifting to the state tax commissioner the burden of seeking increases in the assessments of third parties. In *State ex rel. Rose v. Fewell*, 294 S.E.2d 434, 438 (W. Va. 1982), the court noted that the state legislature "has clothed the [state] tax commissioner with general authority and responsibility for assessment" and has designated that officer as "the state official ultimately responsible for ensuring equitable assessment" in West Virginia. In *Killen*, the court suggested that the state tax commissioner might be an "indispensable party" to taxpayer litigation "concerning equal and uniform or market value assessments [in] actions which challenge an entire class of assessments . . . ." 295 S.E.2d at 709. The state supreme court expressed the view that such participation by the state tax commissioner could eliminate the need for the *Sioux City Bridge* "reduction in assessment" remedy (*id.*), which is grounded on the burden the complaining taxpayer would confront in seeking to raise numerous third party assessments. *See Sioux City Bridge*, 260 U.S. 466-47.

In 1986, the state legislature enacted legislation requiring the state tax commissioner to undertake a statewide reappraisal of property to reflect "true value." W. Va. Code §§ 11-1B-1 *et seq.* Interestingly, petitioners conceded in their brief to the state supreme court in this case that reduction in assessment actions "may very well be precluded in the future after the State Tax Commissioner has fully coordinated and implemented the state-wide reassessment of real property as required by *W. Va. Code* §§ 11-1B-1 et seq." Brief of the Appellees at 73.

Second, the West Virginia Supreme Court has held that state law provides third parties with standing to challenge the assessment values of properties owned by others and to seek increases in those assessments. *Tug Valley Recovery Center, Inc. v. Mingo County Comm'n*, 261 S.E.2d 165, 170 (W. Va. 1979). Even where there is no proof of intentional and systematic discrimination, a taxpayer who believes that neighboring properties have been undervalued has a remedy in West Virginia.

With these alternative remedies in mind, the action of the West Virginia Supreme Court in this case becomes clear. Finding no evidence of intentional and systematic undervaluation of comparable properties in the case, the court reminded petitioners of their right under *Tug Valley* to seek increases in the assessments of particular properties they believe to be undervalued. This approach is wholly consistent with *Louis K. Liggett Co. v. Lee*, 288 U.S. at 540 (interested parties who "deem the tax illegally omitted in certain cases . . . may apply for a writ of mandamus to compel the taxing officials to do their duty.").[19]

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[19] The opinion issued by the West Virginia Supreme Court is not a model of clarity, although *amici* submit that its thrust is the lack of evidence to support petitioners' claims of intentional and systematic undervaluation of properties other than their tracts. It is possible, however, that this Court might interpret the opinion as avoiding the discrimination issue on the ground that petitioners' sole remedy is in any event to " 'seek to have the assessments of other taxpayers raised to market value.' " Pet. App. 9a, quoting *Killen v. Logan County Comm'n*, 295 S.E.2d at 709. If this Court construes the opinion as a ruling that even if intentional discrimination exists, petitioners' sole remedy would be that enunciated in *Kline v. McCloud*, we urge that the appropriate disposition is to reverse the judgment and remand to the West Virginia Supreme Court of Appeals "for a further hearing upon the issue of discrimination." *Sioux City Bridge*, 260 U.S. at 447.

CONCLUSION

For the foregoing reasons, the judgment of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

USE OF PROPERTY TAX SYSTEMS TO IMPLEMENT STATE POLICY OBJECTIVES *

Type of Program	Number of States Using Program
Abatements for Use of Alternate Energy	27 [1]
Abatements for Pollution Control	24 [2]
Abatements for Urban Redevelopment	12 [3]
Abatements for Industrial or Business Development	21 [4]
Abatements Serving Other Governmental Objectives	14 [5]
Use of Differential Rates for Varying Uses of Real Property	11 [6]

[1] Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Vermont, Washington, and Wisconsin.

[2] Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

[3] Connecticut, Hawaii, Indiana, Iowa, Louisiana, Minnesota, Missouri, New Jersey, New York, Ohio, Oklahoma, and Virginia.

[4] Alabama, Arkansas, Florida, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, and Vermont.

[5] Alabama, Arizona, Arkansas, Colorado, Hawaii, Maine, Maryland, Mississippi, New Hampshire, North Dakota, Oregon, Tennessee, Vermont, and Wyoming.

[6] Alabama, Arizona, Colorado, Louisiana, Massachusetts, Minnesota, Montana, North Dakota, South Carolina, Utah, and West Virginia.

* SOURCE: National Ass'n of State Development Agencies, *Directory of Incentives for Business Investment and Development in the United States—A State-by-State Guide* (Urban Institute Press, 2d Ed. 1986).